BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

VALERIE TRAUTLOFF	)	
Claimant	)	
	)	
VS.	)	
	)	
ATCHISON PRODUCTS, INC.	)	
Respondent	)	Docket No. 267,998
	)	
AND	)	
	)	
HARTFORD INS. CO.	)	
FIREMAN'S FUND INS. CO.	)	
UNDERWRITERS INS. CO.	)	
ST. PAUL FIRE & MARINE INS. CO.	)	
COMMERCE & INDUSTRY INS. CO.	)	
Insurance Carriers	)	

ORDER

Respondent and one of its insurance carriers Commerce & Industry Insurance Company (Commerce) requested review of the May 28, 2004 Award by Administrative Law Judge (ALJ) Bryce D. Benedict. The Board heard oral argument on November 2, 2004 in Topeka, Kansas.

APPEARANCES

Jeff K. Cooper, of Topeka, Kansas, appeared for the claimant. Heather Nye, of Overland Park, Kansas, appeared for respondent and its carrier Hartford Insurance Company (Hartford). Steven J. Quinn, of Kansas City, Missouri, appeared for respondent and its carrier Fireman's Fund Insurance Company (Fireman's). John D. Jurcyk, of Overland Park, Kansas, appeared for respondent and its insurance carrier Underwriters Insurance Company (Underwriters). Katherine M. Collins, of Overland Park, Kansas, appeared for respondent and its carrier St. Paul Fire & Marine Insurance Company

(St. Paul). William G. Belden, of Merriam, Kansas, appeared for respondent and its carrier Commerce and Industry Insurance Company (Commerce).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, all parties agreed that the 10 percent functional impairment assessed by the ALJ was acceptable and was not at issue.

ISSUES

The ALJ entered a finding that claimant sustained a series of accidents up to May 22, 2002, the date claimant last worked for respondent before undergoing surgery. The ALJ awarded a 10 percent functional impairment along with a 48.2 percent work disability based upon a 29.6 percent wage loss and 66.7 percent task loss. Given the applicable dates of coverage, Commerce was found to be responsible for this loss as it was the carrier on the declared "date of accident".

The respondent and Commerce request review of the ALJ's decision alleging a variety of errors. They allege the ALJ erred in concluding May 22, 2002 was the claimant's date of accident for purposes of her workers compensation claim. Commerce contends claimant failed to establish that her condition permanently worsened as a result of her work activities following May 7, 2001, the date respondent first provided her with an accommodated job. In addition, Commerce alleges the 66.7 percent task loss found by the ALJ was premised upon a discredited task loss analysis and as such, claimant is not entitled to a work disability. Finally, Commerce contends claimant failed to provide timely notice and written claim as required by Kansas law.

Depending on their relative dates of coverage, the remaining carriers assert either that the ALJ's finding of May 22, 2002 as the accident date should be affirmed[1] or that the date of accident should be considered May 7, 2001.[2] Respondent and St. Paul, the carrier on the risk on May 7, 2001, contend claimant's own testimony was that her symptoms worsened after May 7, 2001 and continued to worsen until May 22, 2003, as she continued to work for respondent in essentially the same job.

Claimant maintains the ALJ erroneously concluded her date of accident was May 22, 2002. Claimant argues her accident date was May 7, 2001, the date she last performed an unaccommodated job for respondent. Claimant goes on to argue that the ALJ erred in concluding she failed to establish a good faith effort to find appropriate

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[1] Fireman's and St. Paul advance this argument.

[2] Hartford, Underwriters and Commerce advance hold this view.

employment following her layoff from respondent's plant. Thus, claimant maintains she bears a 100 percent wage loss up to the time she began receiving wages for her part-time babysitting efforts commencing March 4, 2004. After that date, claimant believes her wage loss was 61.6 percent. When those wage loss figures are averaged with her 66.7 percent task loss, claimant contends she is entitled to an 83.35 percent work disability up to March 4, 2004. Thereafter, her work disability would be modified to 64.2 percent to reflect her 61.6 percent wage loss.

The issues to be addressed are as follows:

1. Claimant's appropriate date of accident;

2. Notice and written claim as it relates to respondent and Commerce; and

3. Nature and extent of claimant's work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant's low back complaints began in 1998 as she was working at a riveting machine while in respondent's employ.[3] Claimant sought treatment from her own private physician in June of 1999. Her medical records reveal ongoing back complaints as well as pain progressing down through her left hip and into her left leg.[4] At this point in time, claimant was working at the riveting machine and advised her employer of the problem.[5] Respondent apparently moved claimant around within the facility in an effort to alleviate her problems. An MRI was performed on July 29, 1999 and revealed a mild disk protrusion at L5-S1. These complaints continued into 2000 and were limited to the low back and left leg. Claimant was treated conservatively with physical therapy, medications and injections. She experienced some temporary relief, but her complaints did not resolve completely.

Claimant testified that her back complaints increased, and she again reported her problems to her employer.[6] Claimant testified that at that point in time, 2001, she was assigned to the job of welting which required her to put two pieces of a bag together and

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[3] The carrier on the risk at this time was Hartford.

[4] P.H. Trans. at 13.

[5] *Id.* at 13.

[6] *Id.* at 16.

while sewing them, pull them through the machine. She indicated that this maneuver caused her a great deal of pain in her back and by April and May of 2001, she was beginning to notice pain in her right hip as well.[7]

Respondent then referred her to Dr. Tom L. Shriwise. On May 7, 2001, Dr. Shriwise examined claimant as well as her previous medical records and concluded that she was suffering from an extruded L5-S1 disk herniation. He suggested "a trial of trochanteric bursal injection and possibly one more epidural before surgical intervention."[8] He recommended she see Dr. Dale Dalenberg, the physician who had provided the lumbar epidural injections earlier in 1999 and 2000. Dr. Shriwise imposed restrictions which limited claimant to "no lifting greater than ten pounds and no combined lifting and twisting greater than five pounds, light pulling only."[9] These restrictions were, more or less, honored after May 7, 2001.

When her physical complaints did not subside and medical treatment was not forthcoming, claimant initiated a preliminary hearing which was held on January 9, 2002. Claimant testified that every position she had been in while at work has caused her pain.[10] Claimant requested medical treatment as outlined by Dr. Shriwise for her repetitive injuries dating back to October 1998 and up to May 7, 2001.[11] It is clear from the transcript of that proceeding that the bigger dispute centered around the claimant's "date of accident" because there were four carriers implicated by the dates contained on claimant's E-1.

The ALJ entered a preliminary hearing Order on January 11, 2002 granting claimant's request for medical treatment and identified Dr. Glenn Amundson as the treating physician. The ALJ specifically concluded claimant's date of accident was May 7, 2001 reasoning that "[t]he evidence indicates that except for a brief period in early 1999, the [c]laimant was working without accommodation, and her condition progressively worsened."[12] Given the date of accident, St. Paul was obligated to provide the benefits ordered, although the preliminary hearing Order does not specifically indicate this fact. Nonetheless, St. Paul provided the benefits awarded by the ALJ following the preliminary hearing.

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[7] *Id.* at 17.

[8] *Id.*, Cl. Ex. 1 at 33 (Dr. Shriwise's May 7, 2001 Report).

[9] *Id.* at 18.

[10] *Id.* at 23.

[11] Application for Hearing (filed July 18, 2001).

[12] ALJ Order (filed January 11, 2002).

In February 2002, claimant saw Dr. Amundson, an orthopaedic spine surgeon, who examined her and recommended some additional testing, including an MRI, a myelogram, CT scan and a discogram. The MRI revealed some mild left foraminal changes at L5-S1 when compared to the previous MRI.[13] Based upon the findings from those tests and her continued complaints, Dr. Amundson recommended surgery on May 23, 2002. Claimant worked for respondent within the restrictions imposed by Dr. Shriwise up to the date of her surgery.

Dr. Amundson performed a posterior lumbar interbody fusion at the L5-S1 level. She had cages placed in her spine which were locked posteriorly with screws and rods to fuse and stabilize her spine.[14] While claimant's symptoms initially subsided in the first 2 weeks following the procedure, she began to experience a return of symptoms. An MRI was repeated to rule out a problem with the hardware. When that test revealed no problem, claimant was treated for her inflammatory leg pain until January 22, 2003, when she was found to be at maximum medical improvement.[15] An FCE was performed and permanent restrictions were imposed in connection with her return to work. These restrictions were for sedentary work only, 10 pound lifting and carrying on an occasional basis along with no sustained sitting, standing, squatting and bending.[16] Dr. Amundson testified that claimant could alternate her sitting and standing during each work day, doing either sitting or standing on an accumulated basis for 2-1/2 to 3 hours a day interspersed with periods of walking or other alternative positions.[17]

Claimant returned to work within her restrictions at an accommodated position and worked until September 30, 2003, when the plant closed for economic reasons.

During the trial in this matter, Dr. Amundson was the only physician to testify. He was asked if claimant had stayed within the restrictions imposed by Dr. Shriwise back on May 7, 2001, would her symptoms would have stayed the same or worsened. He was unable to provide an opinion on that issue.[18] He did say that "[i]f she worked within those restrictions you would hope to prevent significant exacerbation. But just normal activities of daily living could aggravate it or work activities could aggravate the condition."[19]

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[13] Amundson Depo. at 16.

[14] *Id.* at 7.

[15] *Id.* at 9.

[16] *Id.* at 10.

[17] *Id.* at 11.

[18] *Id.* at 6-7.

[19] *Id.* at 7.

In connection with her work disability claim, Dr. Amundson was asked to review a task analysis prepared by Monty Longacre. This analysis refers to the tasks performed by claimant over a 15 year period ending October 1998. Dr. Amundson testified that of the total tasks identified by Monty Longacre, claimant had lost the ability to perform 13 of the 20 tasks, which represents a 66.7 percent task loss.[20] Mr. Longacre also testified that claimant had the ability to earn $220 per week at a sedentary, entry level job.

In March 2004, claimant began working part-time as a babysitter earning $5.15 per hour. Since being laid off from respondent's employ and up to March 2004, she looked for work 2-3 times per week and even attempted a retraining program. The retraining program required her to sit for long periods of time in a classroom and after 3 days, she stopped that program. She has consulted with the job service website as well as newspapers, all with little success, until she was hired to babysit.

When presented with this evidence, the ALJ concluded claimant suffered a series of injuries culminating on May 22, 2002, the last date she worked before having the surgery performed by Dr. Amundson. He based this decision "[i]n light of Dr. Amundson's opinions, the medical records which document a progression of symptoms, and that no medical decision was made until 2002 that surgery was necessary."[21] Accordingly, the ALJ granted claimant's request for work disability benefits. He concluded claimant was able to work a full day and based upon the testimony of Mr. Longacre as to claimant's capacity to earn, he imputed a wage of $220 per week. That figure, when compared to claimant's pre-injury wage, at the time of her layoff, yielded a 29.6 percent wage loss.[22] When averaged with the sole task loss opinion of 66.7 percent, the result was 48.2 percent which was awarded.[23]

The Award also indicates the ALJ found appropriate notice and written claim were established. Finally, given the accident date of May 22, 2002, respondent and its carrier on that date, Commerce, were responsible for the benefits awarded.

The primary issue in this case stems from the claimant's date of accident. In the last ten years this issue has continued to haunt the Courts and practitioners alike. Following creation of the bright line rule in the 1994 *Berry*[24] decision, the appellate courts

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[20] *Id.* at 15, Ex. 3.

[21] ALJ Award (May 28, 2004) at 3.

[22] Claimant's pre-injury wage was found to be $312.41 as of October 1, 2003. None of the parties dispute this figure.

[23] ALJ Award (May 28, 2004) at 4.

[24] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

have grappled with determining the date of accident for repetitive use injuries. In *Treaster*,[25] which is one of the most recent decisions on point, the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive use or micro-traumas (which this is) is the last date that a worker (1) performs services or work for an employer, or (2) is unable to continue a particular job and moves to an accommodated position. *Treaster* also focuses upon the offending work activity that caused the worker's injury as it holds that the appropriate date of accident for a repetitive use or micro-trauma injury can be the last date that the worker performed his or her work duties before being moved to a substantially different accommodated position.

> Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.[26]

In *Treaster*, the Kansas Supreme Court also approved the principles set forth in *Berry*, in which the Kansas Court of Appeals held that the date of accident for a repetitive trauma injury is the last day worked when the worker leaves work because of the injury.

There appears to be a connecting thread between the decisions beginning with *Berry* that address the date of accident issue in cases involving injuries from repetitive trauma. It is a variation of the last injurious exposure rule previously followed in occupational disease cases. (The similarity between repetitive trauma injuries and occupational diseases was not lost upon the Court in *Berry* when it described one such condition, carpal tunnel syndrome, as "neither fish nor fowl.") A claimant's last injurious exposure to repetitive or cumulative trauma is when he or she leaves work. But when the claimant does not leave work or leaves work for a reason other than the injury, then the last injurious exposure is when the claimant's restrictions are implemented and/or the job changes or job accommodations are made by the employer to prevent further injury.

> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.[27]

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[25] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

[26] *Id.* at Syl. ¶ 3.

[27] *Id.* at Syl. ¶ 4.

The Board is aware that the determination of the date of accident in this case places liability for compensation upon Commerce for a permanent partial disability that was asserted before Commerce had assumed the coverage. Determination of this date of accident may result in certain inequities when ascribing liability between successive/multiple insurance carriers of a single employer/respondent.

> We fail to see why the rule laid down in Berry should not be applied equally in a case where the dispute is over coverage between two insurance companies. The actual date of injury is very difficult to pinpoint in these cases, but the last day of work is not. This case is controlled by Berry.[28]

The Board concludes the ALJ was correct in concluding that it was more probably true than not that claimant suffered additional aggravations up to May 22, 2002, the last date she worked before having surgery. Once claimant returned to work following surgery, she was given permanent restrictions which respondent was able to accommodate at least up until the plant closed for economic reasons. The Board notes there is no evidence within the record to suggest that these post-surgery work activities aggravated her condition. The Board finds that because claimant continued to aggravate her condition up to the date she ceased working and had surgery, May 22, 2002 is her correct accident date.[29] Accordingly, the ALJ's finding as to May 22, 2002 as the appropriate accident date is affirmed.

The Board further finds that while claimant did not initially allege that her series of injuries culminated on May 22, 2002, as found by the ALJ, the true date of accident should depend upon the evidence adduced and the Board is authorized to conform the pleadings to the evidence.[30] Moreover, the Board is not bound by technical rules of procedure as long as the parties are given a reasonable opportunity to be heard and present evidence.[31] In this instance, each carrier was given an opportunity to be heard and present arguments on the issue of the claimant's appropriate date of accident. In fact, this issue had been at the forefront of each carrier's mind since the first preliminary hearing. Thus, the Board finds that the carriers have had ample opportunity to develop the evidence pertinent to their respective positions in this matter.

As for respondent and Commerce's argument that claimant failed to provide notice and written claim, the ALJ's finding on those issues are affirmed. Claimant's testimony was

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[28] *Anderson v. Boeing Co.*, 25 Kan. App. 2d 220, 222, 960 P.2d 768 (1998).

[29] *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

[30] See e.g. *Tedder v. Phil Blocker, Inc.*, Nos. 264,296 and 264,297, 2002 WL 598489 (Kan. WCAB March 29, 2002).

[31] *Shehane v. Station Casino*, 27 Kan. App. 2d 257, 3 P.3d 551 (2000).

uncontroverted that she told her employer of her ongoing back and leg problems, as early as 1999. She filed her written claim on July 18, 2001. While these dates pre-date Commerce's coverage, the suggestion that claimant has not met her evidentiary burden in this respect is, at least based upon the record before the Board, baseless.

Finally, both claimant and respondent, with Commerce, challenge the ALJ's finding involving work disability. Claimant asserts that her job search in the months following her layoff and up to March 1, 2004 to be sufficient, while respondent urges the Board to modify the ALJ's finding to deny work disability altogether because it believes claimant failed to establish a credible task loss opinion through Dr. Amundson.

An injured employee is barred from a work disability under K.S.A. 44-510e(a) if he or she is earning 90 percent or more of the employee's pre-injury wage. It is well settled that an injured employee must make a good faith effort to return to work within their capabilities in order to be entitled to work disability under K.S.A. 44-510e(a).[32] If an injured employee fails to make a good faith effort to find appropriate employment, a wage may be imputed based upon the employee's capacity to earn wages.[33] In order to determine if the employee is still capable of earning nearly the same wage, the factfinder must first determine if the employee made a good faith effort to find appropriate employment.[34]

The ALJ concluded claimant failed to establish a good faith effort to find appropriate employment and imputed a wage of $220 per week. The Board affirms this finding. This sum represents a minimum wage job working 40 hours per week. While claimant concedes she is presently working for minimum wage but only on a part-time basis, there is no evidence within the record that suggests she can only work part-time. Indeed, claimant was able to work full-time after surgery for 8 months and only then, when the plant closed, was she laid off. Thus, the imputation of a full-time minimum wage job was appropriate and is affirmed.

As for the claim that claimant's request for work disability should be denied because Dr. Amundson's task loss opinion was based upon a "discredited" task loss, the Board disagrees. While there may have been a typographical error on the dates reflected in the task loss analysis or in the accident date Mr. Longacre was utilizing, it does not appear that claimant's work activities from 1998 and up to surgery changed dramatically. Claimant's restrictions were accommodated, by lessening some of her duties, but it is entirely unclear how that might change the physician's ultimate task loss opinion. Without more concrete criticism or evidence that reveals how Dr. Amundson's opinion might change, the Board is unwilling to modify the ALJ's conclusion and hereby affirms the adoption of

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[32] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[33] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[34] *Parsons v. Seaboard Farms, Inc.* 27 Kan. App. 2d 843, 9 P.3d 591 (2000).

Dr. Amundson's task loss opinion of 66.7 percent. Even if the task loss opinion were somehow inadmissible or patently unreliable, the result would be a zero (0) percent task loss and not a complete denial of work disability benefits as Commerce suggests.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated May 28, 2004, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of November 2004.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Heather Nye, Attorney for Resp. and its Insurance Carrier Hartford
Steven J. Quinn, Attorney for Resp. and its Ins. Carrier Fireman's Fund
John D. Jurcyk, Attorney for Resp. and its Ins. Carrier Underwriters
Katherine M. Collins, Attorney for Resp. and its Ins. Carrier St. Paul Fire & Marine
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